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No. 85-1184

IN THE

Supreme Court of the United States

October Term, 1985

THE BROOKLYN UNION GAS COMPANY,
Petitioner,

against

STATE BOARD OF EQUALIZATION AND ASSESSMENT,
Respondent,

and

THE CITY OF NEW YORK,
Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Brief for Respondent State Board of Equalization and Assessment in Opposition

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Question Presented for Review.

Whether a state court of last resort, in reversing a lower court order and dismissing a case in which the record was complete, deprived petitioner of due process of law in not remanding the case for further proceedings and in not discussing why petitioner's testimony regarding the proper valuation theory was insufficient.

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Citations to the Opinions and Judgments Decided in the Courts Below.

The opinion of the New York Court of Appeals is reported at 65 NY2d 472, 492 NYS2d 598 (1985). The opinion of the Appellate Division, Third Department, is reported at 101 AD2d 414, 477 NYS2d 693 (3d Dept, 1984). The opinion of the trial court, Supreme Court, Albany County, dated May 24, 1983 was not reported. Each of the opinions is reproduced in the appendix to the petition.

No. 85-1184

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE BROOKLYN UNION GAS COMPANY,

Petitioner,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Respondent,

and

THE CITY OF NEW YORK,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Brief for Respondent State Board of Equalization and Assessment in Opposition.

Jurisdiction.

The judgment of the New York State Court of Appeals was entered August 1, 1985. The Court denied petitioner's motion for reargument on October 8, 1985.

The jurisdiction of this Court is allegedly invoked under 28 USC § 1257(3), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The Board contests jurisdiction. Because the decision of the court below rested entirely on adequate and independent state grounds, this Court does not have jurisdiction to issue a writ of certiorari.

Constitutional Provisions Involved.

The Constitution of the United States provides, in pertinent part:

Amendment V:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *"

Amendment XIV:

> "No state shall * * * deprive any person of life, liberty, or property, without due process of law * * *"

Statement of the Case.

Petitioner, a gas utility serving three counties within New York City, maintains extensive special franchise property. A special franchise is the right to maintain facilities within the public right-of-way, and includes the value of the license itself and the tangible property located within the public right-of-way. Real Property Tax Law, § 102(17). Respondent State Board of Equalization and Assessment ("Board") is the state agency responsible for assessing annually all special franchises within the state for purposes of municipal real property taxation. New York Real Property Tax Law, §§ 200, 600. Intervenor-respondent City of New York ("City") is the municipality within which petitioner maintains its special franchises.

This case originated with petitioner's challenge, under Article 7 of the New York Real Property Tax Law, to the final 1980 assessment of its special franchise properties at $497.7 million made by the Board. The trial court heard testimony from three appraisers, two presented by petitioner and one presented by the City. Because the City's appraisal testimony fully supported the Board's assessment, the Board did not present a separate appraisal witness.

The first appraisal witness presented by petitioner, Mr. Green, considered various approaches to determining the fair market value of petitioner's special franchises, including reproduction cost new less depreciation ("RCNLD"). He testified, however, that he gave no credence to the value he derived from his RCNLD approach. Using various other methods, he appraised petitioner's special franchise value at $232.1 million.

Petitioner's second appraisal witness was Julius Breitling, whose appraisal was adopted by the trial court. He determined a special franchise value of $264.4 million by averaging an original cost less depreciation value ("rate base") and a capitalization of net income value. Although Mr. Breitling also used an RCNLD method of determining value, he did not consider it when determining his final value. Mr. Breitling did not include any value for the intangible portion of petitioner's special franchises under any of his approaches. In his RCNLD approach, Mr. Breitling deducted hundreds of millions of dollars for various reasons. The City and the Board objected to the deductions, maintaining there was no legal basis for them.

Jack C. Emery, the City's appraiser, used the RCNLD method of appraising petitioner's special franchises to arrive at a value of $603 million, including $67 million for the intangible value of the franchises. Mr. Emery did not make deductions similar in type or amount to those made by Mr. Breitling and objected to by the Board and the City.

The trial court adopted the value determined by Mr. Breitling and annulled the Board's assessment. In doing so, it held that capitalization of income is a legitimate appraisal method for valuing a special franchise, "especially

when the only evidence in the record is that the system, if reproduced, would not be reproduced in its present form" (25a).[1]

The Appellate Division unanimously affirmed, stating that the existing system "would never be reproduced in its present form but would be replaced with a new completely modern system" (14a). The court also stated that:

> "Since the market data approach could not be considered because of the lack of comparable sales, and the facility could not be considered a specialty since it is unreasonable to conclude that the facility would be replaced on an economic basis [citations omitted], the capitalization of income method used herein provides the most accurate method of determining value [citations omitted]. Moreover, we would reach the same result even if the facility was considered a specialty" (14a).

Petitioner's arguments here make it important to review the contentions put forth below by the Board. In its brief to the Court of Appeals, the Board argued that: (1) functional tangible special franchise property whose use would be reproduced must, as a matter of state law, be valued by using the RCNLD approach; (2) the methods of valuation relied upon by petitioner's appraisers and accepted by the courts below are not proper methods of valuing tangible special franchise property as a matter of state law; (3) the courts below erred, as a matter of state law, in not determining any value for the intangible portion of petitioner's special franchises; (4) the methods used by petitioner's appraisers and relied on by the courts below, even assuming

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[1]Parentheticals refer to pages of petitioner's appendix.

their validity in state law, were not properly applied and therefore generated erroneous values; (5) the RCNLD evidence of appraisal offered by petitioner, but not considered by the courts below, did not support the values found by the courts or justify any reduction in the Board's assessment; and (6) were the Court to disallow the deductions (which were improper as a matter of law) taken under petitioner's RCNLD appraisal, petitioner's RCNLD appraisal supported the Board's assessment. Accordingly, the Board argued that petitioner had failed to overcome the presumption of validity established by New York law for the Board's assessments, and therefore the assessments should stand, the judgment below should be reversed, and the petition should be dismissed.

In a unanimous opinion adopting all of the Board's arguments, the Court of Appeals reversed and dismissed the petition, reinstating the Board's assessment.

Petitioner then moved for reargument, alleging *inter alia,* that the Court had erred in not giving credence to petitioner's RCNLD appraisal and that such an error denied petitioner due process of law by depriving petitioner of "its day in court and the right to further contest the assessment in this judicial proceeding."

The Court of Appeals denied the motion for reargument in a single sentence, making no mention of the constitutional argument (or any others) raised in the motion papers (30a).

Opinion of the Court of Appeals (1a-11a).

The Court of Appeals stated the issue, simply and accurately, as whether the special franchise property owned

by petitioner (and the special franchise property owned by another utility) was specialty property, to be valued for special franchise assessment and taxation purposes by the RCNLD method, or whether a capitalization method of valuation was an acceptable method of valuation for such property (1a). The Court then discussed the proof adduced at trial in this case and in another involving a separate utility which the court had chosen to decide at the same time (1a-7a). (Although the trial records and outcomes in the two cases were quite different, both cases received similar decisions from a state intermediate court, the Appellate Division, Third Department.)

The Court then stated that New York State courts have uniformly held that RCNLD was the appropriate method of valuing the tangible components of special franchise property, citing *People ex rel. Delaware, Lackawanna & W.R.R. Co. v. Clapp,* 152 NY 490 (1897); *People ex rel. Jamaica Water Supply Co. v. State Board of Tax Commissioners,* 196 NY 39 (1909); *Matter of Onondaga County Water District v. Board of Assessors,* 39 NY2d 601 (1976); *Matter of Consolidated Edison Co. v. State Board of Equalization and Assessment,* 101 Misc 2d 910 (Sup Ct, Albany Co, 1979), *mod on other grounds,* 83 AD2d 355 (3d Dept, 1981), *affd,* 58 NY2d 710 (1982). RCNLD is appropriate, the Court said, because special franchise property is considered to be "specialty property" (7a). The Court then discussed the leading case defining specialty property, *Matter of County of Suffolk (C.J. Van Bourgondien, Inc.),* 47 NY2d 507, 512 (1979). A property is a "specialty," said the Court (7a-8a), when it meets four criteria: (a) the improvement must be unique and must be specially built for the specific purpose for which it is designed; (b) there must be a special use for which the improvement is designed and the improvement

must be so specially used; (c) there must be no market for the type of property and no sales of property for such use; and (d) the improvement must be an appropriate improvement at the time of the taking and its use must be economically feasible and reasonably expected to be replaced.

The Court said there was no doubt that the special franchise properties owned by the utilities involved in the two cases before it fully satisfied the first three criteria, and then held that the trial court in the *Brooklyn Union* case and the Appellate Division in both cases had misinterpreted the fourth element on the law when they said that the system "would not be reproduced in its present form" and that it was "unreasonable to conclude that the facility could be replaced on an economic basis" and therefore the property "could not be considered a specialty" (8a). The Court of Appeals said that this requirement relates to the use or function of the property and means that the use or function must be reasonably expected to be replaced; it was not necessary that the material of which it was originally composed be replicated (8a).

The Court then held that the special franchise properties of the utilities in both cases were "specialty properties" and that the proper method of valuing their tangible property is by RCNLD, to which should be added, in order to determine the full value, the value of the intangible franchise (the right to use the public streets and thoroughfares for the placement of their tangible property), arrived at by capitalization-of-income, where there exists excess income, or by adding 5% of the value of the tangible real property where there is no excess income (11a).

The Court therefore reversed the Appellate Division order in *Brooklyn Union*, dismissed the petition, and

reinstated the State Board's assessment. The Court also reversed the Appellate Division order in the other case and reinstated the judgment of the trial court dismissing the petition (11a).

REASONS FOR DENYING THE WRIT.

The petition should be denied for want of a substantial federal question.

Petitioner argues that the Court of Appeals denied it due process in two ways: in dismissing rather than remanding the case, and in not discussing why petitioner's RCNLD testimony was insufficient. It claims it was therefore deprived of any opportunity for a factual hearing and a ruling on the merits of its RCNLD testimony (Pet, pp 4, 9, 21).

Petitioner *had* its opportunity for a hearing at the trial level where it put in RCNLD testimony. However, it so misapplied the methodology that petitioner failed to overcome the strong presumption of validity New York law attaches to the Board's assessments under the *Jamaica Water Supply Co.* case, 196 NY at 53. Under New York law, a taxpayer cannot sustain its burden of proving overassessment with improper appraisals or even by improperly applying proper methods. E.g., *Matter of the City of New York (Atlantic Improvement Corp.)*, 28 NY2d 465, 472 (1971). The Court of Appeals decision to dismiss rather than remand merely means that, in the judgment of the Court of Appeals, petitioner failed to carry its burden and overcome the presumption of validity.

No purpose would have been served by a remand. Petitioner is correct that the Court of Appeals did not review any questions of fact because of the limitations of its jurisdiction, but that is beside the point. Use of an erroneous theory of valuation involves a question of law; whether the record contains evidence adequate to support a trial court's findings of fact is also a question of law. *Matter of B. Altman & Co. v. City of White Plains*, 57 NY2d 904, 905-906 (1982); *Matter of Seagram & Sons v. Tax Commission of City of New York*, 14 NY2d 314, 317 (1964). Both questions were therefore reviewable by the Court of Appeals. *Ibid.*

Surely the Court of Appeals was aware of petitioner's appraisal testimony on RCNLD even though the decision does not explicitly refer to it. The parties thoroughly discussed the testimony in their briefs to the Court of Appeals (Pet Br, pp 32-36, 81-85, 87-89; Board's Br, pp 12, 14, 54-62; Board's Reply Br, pp 12-14); it was discussed at even greater length in the motion for reargument (Pet Br, pp. 1-19, 22). As this Court no doubt knows, the opinions rendered in a particular case do not, and need not, mention every fact and contention pressed by the parties. The Court's opinion did mention the RCNLD testimony put forth by the City and joined in by the Board (3a, 4a).

The cases cited by petitioner (at pp 13-16) for the proposition that the Court of Appeals treated petitioner differently from other taxpayers in the past merely indicate that the Court can remand cases for further fact-finding where that is necessary because of the incompleteness of the record in a particular case, which is *not* the case here. There was extensive testimony on RCNLD valuation in this case. Under such circumstances, remand was unnecessary and dismissal was appropriate.

It is clear, therefore, that the decision of the court below rested entirely on adequate and independent state grounds, not federal grounds. This Court has long adhered to the doctrine that it will not review judgments of state courts which rest upon adequate and independent state grounds. *Florida v. Casal and Garcia*, 462 US 637 (1983) (Burger, C.J., concurring); *Herb v. Pitcairn*, 324 US 117, 126 (1945); *Klinger v. Missouri*, 80 US 257 (1872).

This is precisely the kind of situation to which the rule applies. The case was briefed, argued, and decided on issues of state law. Petitioner's imploration to this Court is not based on any misapplication of federal law by the court below. The decision below turned entirely on questions of state law, *i.e.*, whether RCNLD is, under New York law, the proper method of valuing special franchise property for municipal real property taxation purposes and whether petitioner's evidence was insufficient, as a matter of law, to support its claims. These are questions of local, not national importance.

Petitioner's belated attempt to interject a federal question in its post-decision motion for reargument to the State's highest court does not convert either the state law issue into a federal one or the Court's dismissal of the case into a federal rights issue. Not surprisingly, petitioner is unable to cite *any* instance of this Court reviewing a state court judgment involving issues of state law where the "federal question" raised by petitioner consisted merely of naked allegations that the state court denied petitioner due process of law by reversing on the law and dismissing the case. Petitioner received the process which was its due in pressing its claims before three levels of state courts. The Court of Appeals agreed with the Board that the record was sufficiently complete and therefore properly dismissed the petition rather than remanding it.

Petitioner has not demonstrated any special and important reasons for granting certiorari. The case does not even remotely qualify for consideration of certiorari under Rule 17 of this Court's Rules. The court below did not decide a "federal question in a way in conflict with the decision of another state court of last resort or a federal court of appeals" nor did it decide "an important question of federal law which has not been, but should be settled by this Court" nor "in a way in conflict with applicable decisions of this Court". Rule17, subd 1(b), (c). It did not "decide" a federal question at all, much less one of importance or in conflict with other appellate courts. On its face, the petition is defective and the writ should be denied.[2]

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[2]Even the Court's summary denial of petitioner's motion for reargument did not constitute a decision on a federal question. See *Radio Station WOW v. Johnson*, 326 US 120, 128 (1945). And petitioner cannot legitimately claim that the Court of Appeals ruling could not have been anticipated, given the long line of cases (discussed in the briefs by the Board and the City and in the opinion by the Court of Appeals) upholding RCNLD as the appropriate methodology for assessing special franchise property for real property taxation purposes in New York State, and thus come within the limited situation where raising a federal question for the first time in a petition for rehearing to the State's highest court will suffice to raise a substantial federal question for this Court's consideration because the lower court ruling was unanticipated. *Herndon v. Georgia*, 295 US 441 (1935).

CONCLUSION.

The petition for a writ of certiorari should be denied.

Dated: Albany, New York
February 13, 1986

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